STATE OF MICHIGAN

COURT OF APPEALS

GWENDOLYN S. NAVARRO and JOHN NAVARRO,

Plaintiffs-Appellees,

and

BLUE CROSS AND BLUE SHIELD OF MICHIGAN,

Intervening Plaintiff-Appellee,

v

SAIB ISTERABADI,

Defendant-Appellant.

UNPUBLISHED
June 13, 2006

No. 256628
Sanilac Circuit Court
LC No. 98-025585-NM

GWENDOLYN S. NAVARRO and JOHN NAVARRO,

Plaintiffs,

and

BLUE CROSS AND BLUE SHIELD OF MICHIGAN,

Intervening Plaintiff-Appellant,

v

SAIB ISTERABADI,

Defendant-Appellee.

No. 256654
Sanilac Circuit Court
LC No. 98-025585-NM

Before: Bandstra, P.J., and Fitzgerald and White, JJ.

PER CURIAM.

In this consolidated appeal, defendant appeals as of right in Docket No. 256628 the circuit court's order awarding plaintiffs a supplemental award of case evaluation sanctions and interest from the date of the filing of plaintiffs' complaint. In Docket No. 256654, intervening plaintiff Blue Cross and Blue Shield of Michigan (BCBSM) appeals as of right the circuit court's order denying its motion for entry of judgment and costs for medical expenses paid on behalf of plaintiff Gwendolyn Navarro. In Docket No. 256628, we vacate the circuit court's order. In Docket No. 256654, we vacate the circuit court's order and remand for further proceedings on BCBSM's claim.

This medical malpractice case was previously before this Court in *Navarro and Blue Cross and Blue Shield of Michigan v Isterabadi*, unpublished opinion per curiam of the Court of Appeals, issued September 11, 2003 (Docket Nos. 231352 and 231421) (hereinafter *Navarro I*). Plaintiffs' claims arose from an injury suffered by Gwendolyn Navarro to her eleventh cranial nerve as a result of a lymph node biopsy surgery performed by defendant. BCBSM sought to intervene in the lawsuit, to recover amounts paid for plaintiff's health care expenses due to defendant's negligence, either from plaintiff if plaintiff recovers therefor, or from defendant if plaintiff fails to submit proof of such expenses. An order was entered permitting the intervention and stating that BCBSM "shall not be required to participate in the trial of the main action." After a jury trial, a verdict in favor of plaintiffs in the amount of $135,000 was rendered, and a judgment on the jury verdict was entered.

Thereafter, BCBSM filed a notice that a non-jury trial would be conducted on its intervening complaint. Defendant filed a motion to quash the notice and dismiss the intervening complaint. The circuit court granted defendant's motion and dismissed the intervening complaint, agreeing with defendant's argument that BCBSM had the choice of either relying on plaintiff to recover damages for the medical expenses and then proceeding under MCL 600.6303, or itself participating in the trial and seeking recovery for the medical expenses, but that it was not entitled to a separate trial on damages. This Court affirmed the judgment for plaintiffs, but vacated the circuit court's order dismissing BCBSM's complaint, concluding that the circuit court erred in concluding that its prior order did not provide for a separate trial for BCBSM with regard to its claim for damages, and remanded the case for further proceedings to determine if any of defendant's other issues raised as grounds for dismissal of the intervening complaint were meritorious. *Navarro I, supra,* slip op at 4-5.

After this Court issued its opinion in *Navarro I*, plaintiffs filed a motion for attorney fees and sanctions under MCR 2.403. Relying on this Court's decision in *Haliw v Sterling Heights*, 257 Mich App 689; 669 NW2d 563 (2003), rev'd 471 Mich 700; 691 NW2d 753 (2005), the circuit court awarded plaintiffs $21,231 for their appellate attorney fees with interest thereon from the date of the filing of their complaint. Additionally, BCBSM moved for entry of

judgment against defendant for the medical expenses it paid on plaintiff's behalf.[1] The circuit court entered an order denying BCBSM's motion for entry of judgment and costs and dismissing its intervening complaint.

DOCKET NO. 256628

Defendant argues that the award of appellate costs and attorney fees to plaintiffs should be reversed because MCR 2.403 does not authorize such an award. We agree. During the pendency of this appeal, the Supreme Court reversed this Court's decision in *Haliw*, which had concluded that appellate attorney fees were recoverable as part of case evaluation sanctions under MCR 2.403(O). *Haliw, supra*, 257 Mich App at 698-699, rev'd 471 Mich 700. After reviewing the language of MCR 2.403, the Supreme Court concluded that this Court's decision was not supported by either the language of MCR 2.403(O) or a correct construction of the court rules. *Haliw, supra*, 471 Mich at 706.[2] Thus, the supplemental award to plaintiffs of appellate attorney fees and costs is vacated.

DOCKET NO. 256654

BCBSM argues that the circuit court erred in dismissing its complaint under the collateral source statute because it does not apply to a case such as this, where plaintiff did not introduce evidence at trial that BCBSM paid her medical expenses. We agree. MCL 600.6303 provides:

> (1) In a personal injury action in which the plaintiff seeks to recover for the expense of medical care, rehabilitation services, loss of earnings, loss of earning capacity, or other economic loss, evidence to establish that the expense or loss was paid or is payable, in whole or in part, by a collateral source shall be admissible to the court in which the action was brought after a verdict for the plaintiff and before a judgment is entered on the verdict. Subject to subsection (5), if the court determines that all or part of the plaintiff's expense or loss has been paid or is payable by a collateral source, the court shall reduce that portion of the judgment which represents damages paid or payable by a collateral source by an amount equal to the sum determined pursuant to subsection (2). This reduction shall not exceed the amount of the judgment for economic loss or that portion of the verdict which represents damages paid or payable by a collateral source.
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> * * *

[1] The instant dispute, as with the prior appeal, involves BCBSM's claim against defendant, not a claim for reimbursement out of the jury award for plaintiff.

[2] Noting that MCR 2.403(O) lacks any reference to appellate attorney fees and costs and that appellate costs and attorney fees are addressed in an entirely different section of the court rules, our Supreme Court observed that MCR 2.403(O) is a "trial-oriented" court rule and is not applicable to appellate costs and attorney fees. *Haliw, supra*, 471 Mich at 707-708.

(3) Within 10 days after a verdict for the plaintiff, plaintiff's attorney shall send notice of the verdict by registered mail to all persons entitled by contract to a lien against the proceeds of plaintiff's recovery. If a contractual lien holder does not exercise the lien holder's right of subrogation within 20 days after receipt of the notice of the verdict, the lien holder shall lose the right of subrogation. This subsection shall only apply to contracts executed or renewed on or after the effective date of this section.

(4) As used in this section, "collateral source" means benefits received or receivable from an insurance policy; benefits payable pursuant to a contract with a health care corporation, dental care corporation, or health maintenance organization; employee benefits; social security benefits; worker's compensation benefits; or medicare benefits. Collateral source does not include life insurance benefits or benefits paid by a person, partnership, association, corporation, or other legal entity entitled by law to a lien against the proceeds of a recovery by a plaintiff in a civil action for damages. Collateral source does not include benefits paid or payable by a person, partnership, association, corporation, or other legal entity entitled by contract to a lien against the proceeds of a recovery by a plaintiff in a civil action for damages, if the contractual lien has been exercised pursuant to subsection (3).

(5) For purposes of this section, benefits from a collateral source shall not be considered payable or receivable unless the court makes a determination that there is a previously existing contractual or statutory obligation on the part of the collateral source to pay the benefits.

We agree with BCBSM that the statute is inapplicable by its terms because plaintiff did not seek recovery for her medical expenses paid by BCBSM, and BCBSM was not entitled by contract to a lien against plaintiff's recovery because plaintiff did not recover for medical expenses paid by BCBSM.

The circuit court also dismissed BCBSM's intervening complaint based on its conclusion that BCBSM has no right to equitable subrogation under *Michigan Hosp Service v Sharpe*, 339 Mich 357; 63 NW2d 638 (1954), and that the only contractual subrogation right was found in the assignment that was executed after the judgment for plaintiff was entered, when plaintiff's right to recover medical expenses against defendant had already been extinguished.

"Equitable subrogation is a flexible, elastic doctrine of equity." *Hartford Accident & Indemnity Co v Used Car Factory, Inc*, 461 Mich 210, 215; 600 NW2d 630 (1999). "'Subrogation' denotes two different kinds of rights, those that are transferred in effect by way of contractual assignment and those that arise by operation of law from the relations of various involved parties under equitable principles." *Citizens Ins Co of America v Buck*, 216 Mich App 217, 225; 548 NW2d 680 (1996).

"The doctrine of subrogation rests upon the equitable principle that one, who, in order to protect a security held by him, is compelled to pay a debt for which another is primarily liable, is entitled to be substituted in the place of and to be

> vested with the rights of the person to whom such payment is made, without agreement to that effect." [*Tel-Twelve Shopping Ctr v Sterling Garrett Constr Co*, 34 Mich App 434, 439; 191 NW2d 484 (1971), quoting *French v Grand Beach Co*, 239 Mich 575, 580; 215 NW 13 (1927).]

In support of its argument that it has an equitable subrogation right in this case, BCBSM cites *Auto-Owners Ins v Amoco Prod Co*, 468 Mich 53; 658 NW2d 460 (2003), which held that a no-fault insurer was entitled, under the doctrine of equitable subrogation, to reimbursement from the defendant for medical bills paid on its insured's behalf. However, *Auto-Owners* is distinguishable from this case because Auto-Owners was a no-fault insurer that was only secondarily liable for the plaintiff's medical expenses and sought to recover from the entity that was primarily liable. *Id*. at 62. In contrast, in *Michigan Hosp Service v Sharpe*, *supra*, relied on by defendant, the plaintiff, a healthcare organization, was precluded from recovery under the doctrine of equitable subrogation for the defendant's medical expenses because plaintiff "had a primary obligation to provide service in accordance with the terms of the contract." *Id*. at 373.[3] BCBSM distinguishes *Sharpe* on the ground that the *Sharpe* Court recognized an insurance company's right to equitable subrogation, but held that the healthcare organization was not an insurer and could not rely on CL 1948, § 612.1, which permitted insurers to join in actions against tortfeasors at law. Subsequent to the decision in *Sharpe*, the Legislature enacted the Non-Profit Health Care Corporation Act, MCL 550.1101 *et seq*. MCL 550.1401 provides:

> (5) A certificate may provide for the coordination of benefits, subrogation, and the nonduplication of benefits. . . .
>
> (6) A health care corporation shall have the right to status as a party in interest, whether by intervention or otherwise, in any judicial, quasi-judicial, or administrative agency proceeding in this state for the purpose of enforcing any rights it may have for reimbursement of payments made or advanced for health care services on behalf of 1 or more of its subscribers or members.

The statute contemplates BCBSM's direct participation in litigation to recover for the expense of health care services it paid for. The principle of equitable subrogation applies to BCBSM as it does to an insurer who pays for a loss and then seeks to recover from the legally responsible party.

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[3] Our Supreme Court reasoned:

> "'The doctrine of subrogation arises only in favor of one who pays the debt of another, and not in favor of one who pays the debt in performance of his own covenants. This right never follows a primary liability.'" [*Id*., quoting *Machined Parts Corp v Schneider*, 289 Mich 567, 575; 286 NW 831 (1939).]

BCBSM's intervening complaint stated two counts, one for reimbursement from plaintiff's recovery for medical expenses, and one for recovery from defendant for expenses it paid for plaintiff. In the prior appeal, this Court determined that the order permitting intervention also provided that BCBSM's claim could be separately tried. Had plaintiff recovered for the expenses paid by BCBSM, the trial court would have adjudicated BCBSM's lien. Because plaintiff did not seek to recover these expenses, the claim remained unliquidated at the end of the trial. However, the claim remained pending and subject to the court's prior order allowing a separate trial. The court erred in dismissing BCBSM's claim as having been merged in plaintiff's recovery.

The circuit court's order allowing attorney fees and sanctions pursuant to MCR 2.403 is vacated, as is its order denying BCBSM's motion for entry of judgment and costs. The matter is remanded for further proceedings on BCBSM's claim. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Helene N. White